

MEMORANDUM OF LAW

DATE: June 27, 1990

TO: The Honorable Mayor and City Council
FROM: C. M. Fitzpatrick, Assistant City Attorney
SUBJECT: Use of Interest Derived From Investment of
Water Utility and Sewer Revenue Funds to Defray
City Costs in Opposing Proposed SCE/SDG&E Merger;
Legality of

BACKGROUND

At the hearing before the City Council sitting as the Budget Review Committee on Tuesday, June 19, 1990, the Committee, at the suggestion of Councilman Henderson, requested the opinion of this office on the legality of allocating a portion of the interest derived from the investment of Water Utility and Sewer Revenue Funds for the sole and exclusive purpose of defraying a portion of the costs incurred by the City in opposition to the proposed SCE/SDG&E merger.

At the time, we indicated to you that we believed there was no legal obstacle to such an allocation. This memorandum examines the question in more detail and confirms our earlier view.

ANALYSIS

Following the joint announcement by SCEcorp and San Diego Gas & Electric Company ("SDG&E") in November 1988 that they had agreed to merge SDG&E with and into Southern California Edison Company, the City Council determined to oppose the proposed merger. Since then and until now the City Council serially has appropriated approximately \$5.5 million to fund the extensive efforts of the City Attorney and his staff to oppose the matter before the various federal and state regulatory agencies and in the courts.

One of the principal reasons for this opposition has been the Council's expressed concern that electric and gas rates of the

newly merged company would increase inordinately above those of an independently operated SDG&E. (See City Council Resolution No. 274786, dated November 30, 1989.)

Until now, all of the appropriations which have funded this opposition have been from the City's General Fund. If some allocation of Water Utility and Sewer Revenue funds is legally permissible, it will depend on the connection or nexus between the fundamental purposes for which these funds were established

and are maintained and the efforts for which the monies from these funds could potentially be allocated and spent. Thus, we must examine the statutory (or other) authorization creating the funds to determine what, if any, nexus exists.

THE WATER UTILITY REVENUE FUND

This Fund was created by City Charter section 53 and has been the subject of numerous opinions and memoranda of law by this office over the years. (See City Attorney Report Number RC-90-35, dated June 19, 1990, at page 5 for the reference to some of these opinions and memoranda.)

Section 53 provides that all revenues of the Water Utility shall be deposited in a Water Utility Fund. These revenues are derived from the sale of water by the City to water users (primarily within the City) at rates established from time to time by the City Council. Section 53 goes on to provide the monies from this Fund must be used first for "operating and maintenance costs," etc. Clearly one of the "operating costs" of the Water Utility is the cost of obtaining electrical power to energize the electrically operated pumps and other mechanisms necessary to deliver potable water to customers. An increase in that cost is clearly an operational cause of concern. To the extent that the Water Utility incurs costs and expenses of this sort it appears that a reasonably clear connection and nexus can be made to the cost and expense of opposing the proposed merger.

If, indeed, the opposition to the merger is justified upon a rationale (among others) that the merger may well result in higher electric bills for the citizens of this City and the City as a customer itself, then who would gainsay the argument that the Water Utility should not, in some fashion, bear some of the cost of this opposition based upon some reasonable ratio of potential benefit?

Subsequently, we will discuss and propose what we believe would be a reasonable ratio for these purposes. But first let us examine the case with respect to the Sewer Revenue Fund.

THE SEWER REVENUE FUND

Although the sewer utility function of the City is operated and managed through the Water Utilities Department, it is not governed by Section 53 of the Charter. Indeed, as we have pointed out on various occasions, the Sewer Utility has its own revenue sources and restrictions concerning their expenditure.

The Sewer Revenue Fund was established by the enactment of San Diego Municipal Code section 64.0403. That section first provides that all revenues derived from the operation of the City's wastewater system shall be paid into the Fund. The

section further provides that all revenues shall be first used for the purpose of paying the "cost of maintenance and operation" of the City's wastewater system.

Looking now at the rationale we suggested above with respect to the utilization of some portion of the Water Utility Revenue Fund, we see no reason why that same reasoning cannot be applied to this Fund. From a practical point of view, the reasoning may be even more telling in that the City's massive pump stations number 1 and number 2 may well be the largest single users of electrical power within the SDG&E system.

Because any increase in gas and electric expenses represents a significant cost factor to City government, we are satisfied that a nexus exists. Our next and final test must be an examination of a fair and reasonable ratio of expenditure for these purposes.

A REASONABLE RATIO

A review of the City's accounts of payment for electric service to SDG&E by the City Auditor reflects that for the past eighteen (18) months the City's electric bill should be apportioned by attributing 15 percent of the cost to the Water Utility and 35 percent of the cost to the Sewer Utility. To the extent then that the heretofore appropriated General Fund amount has equalled \$5.5 million, we see no legal impediment to a City Council authorized allocation of interest earnings equal to 15 percent of the \$5.5 million from the Water Utility Revenue Fund and an interest earnings allocation of 35 percent of the \$5.5 million from the Sewer Revenue Fund. These funds could be credited either as a reimbursement to the General Fund for Fiscal Years 1988-89, 1989-90 expenses or as an allocation for Fiscal 1990-91 toward costs for opposition to the merger. The end result then would be the payment of all anti-merger efforts past

and future by monetary allocations which would equal 50 percent from the General Fund; 15 percent from the interest on investment of the Water Utility Fund; and 35 percent from the interest on investment of the Sewer Revenue Fund.

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By

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